

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge  
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**RECEIVED**

OCT 15 2015

S.C. Supreme Court

REGINALD SPELLMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000525  
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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that Petitioner Spellman's guilty plea was entered voluntarily and knowingly?

## STATEMENT

In December 2010, the Richland County Grand Jury indicted Petitioner Reginald Spellman on the charge of assault with intent to commit criminal sexual conduct (CSC) with a minor first degree. On January 9-13, 2012, Spellman proceeded to trial before the Honorable G. Thomas Cooper, Jr. and a jury. Spellman was represented by Reynolds H. Blankenship, Jr. and Prentiss Counts Shealy. The state was represented by Margaret Fent Bodman and Craig Pisarik. App. 1. The jury returned a verdict of guilty as indicted. App. 520, ll. 16 – 25. Several days following the jury verdict and before sentencing, a juror revealed that she unintentionally failed to disclose a repressed childhood memory of sexual abuse. An in-chambers hearing was held on the record on February 2, 2012 before Judge Cooper. Spellman was represented by Reynolds Blankenship, and the state was represented by Margaret Fent-Bodman and Craig Pisarik. App. 527. The judge found that the juror's failure to disclose was unintentional so no mistrial was granted. App. 545, ll. 2 – 5.

On February 27, 2012, Spellman appeared before Judge Cooper for a guilty plea. The state explained that subsequent to the guilty verdict and before sentencing, due to the possibility of a mistrial, the state and defense had reached a plea agreement. They were consenting to the jury's verdict of guilty being set aside. The plea agreement was a plea by Spellman to lewd act on a child for the maximum fifteen years. App. 543 – App. 545, ll. 1. Judge Cooper honored the plea agreement and sentenced Spellman to fifteen years incarceration. App. 551, ll. 17 – 24.

A notice of appeal was filed with the South Carolina Court of Appeals. The appeal was dismissed on February 2, 2013 due to Petitioner Spellman's failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. An Order of Dismissal was issued on February 2, 2013. Petitioner filed a motion to recall the remittitur which was denied on September 11, 2013. App. 627.

On June 24, 2013, Petitioner Spellman filed an application for post-conviction relief (PCR). The state filed a return on December 13, 2013. An amended PCR application was filed on October 14, 2014. An evidentiary hearing was held December 9, 2014 before the Honorable J. Ernest Kinard, Jr. Spellman was represented by Anna Good, and the state was represented by Clay Mitchell. App. 570. Judge Kinard issued an order on February 13, 2015 denying Spellman's PCR application and dismissing it with prejudice. App. 626-App. 633. Spellman's attorney filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that Petitioner Spellman's guilty plea was entered voluntarily and knowingly.

Reginald Spellman was charged with assault with intent to commit criminal sexual conduct with his six year old stepdaughter. Spellman was living with the child, her mother, and her two older brothers at the time. App. 180, ll. 20 – App. 182, ll. 15; App. 228, ll. 8 – app. 229, ll. 25; App. 232, ll. 2 – 25. The child, who was twelve years of age at trial, testified that she got tired of people asking her if someone had been mean to her or touched her or why she acted bad so she told her teacher, Mr. Morgan. Then she talked to the officer at school, and then was interviewed at the Assessment Resource Center. App. 234, ll. 4 – App. 235, ll. 25.

The child described how Spellman tried to penetrate her between her legs with his penis, and then tried to make her perform oral sex on him. She screamed for help but her brothers did not come. She tried to tell her mother but her mother told her to hush. The sexual encounters happened a “lot of times” when her mother was at work or asleep. App. 239, ll. 14 – App. 248, ll. 24.

The forensic interviewer, Heather Smith, was qualified as an expert in the era of forensic interviewing. Defense counsel said: “No objection” App. 339, ll. 8 – App. 348, ll. 4. Ms. Smith testified that she used the RATAC method of interviewing. App. 350, ll. 1 – 20. She interviewed this child on June 18, 2010 when the child was ten years old in a recorded interview. The child did not disclose the sexual abuse until four years later when she was ten. App. 354, ll. 18 – 24; App. 138, ll. 12 – App. 139, ll. 2. Ms. Smith discussed in lengthy detail the interviewing and delayed disclosure. App. 355, ll. 1 – App. 368, ll. 25.

Defense counsel objected in a pretrial hearing to the admission of the video of the forensic interview of the child. App. 152, ll. 1 – App. 153, ll. 3. When the video of the forensic interview was admitted into evidence, defense counsel objected. App. 369, ll. 1 – 21.

Spellman testified at his trial that he had never sexually touched this child. He had never removed her clothes and was not guilty of this charge. He was married to the child's mother, and was still married to her. App. 394, ll. 21 – App. 397, ll. 25.

The jury found Spellman guilty as indicted. App. 520, ll. 1 – 25. However, sentencing was delayed due to the illness of the trial judge. App. 523, ll. 18 – App. 525, ll. 7.

After it was learned that a juror had failed to disclose a repressed memory of child sexual abuse she had experienced, a hearing was held in chambers with the attorneys and court reporter on February 2, 2012. Spellman was not present. App. 527 – App. 541, ll. 20. The juror explained that she was leaning towards not guilty when child hood memories came to her. The evidence at trial brought up these repressed memories. App. 529, ll. 1 – App. 533, ll. 6.

At the guilty plea, the judge explained that the juror's failure to disclose was unintentional. The judge did not think that he would have granted a mistrial. App. 545, ll. 2 – 21.

When the judge asked Spellman if he committed some sort of lewd act on this child between December 31, 2004 and September 28, 2006, Spellman said yes. App. 548, ll. 1 – App. 549, ll. 22.

At his PCR hearing, Spellman testified that he retained his trial attorney and told him from the beginning that he wanted a trial. App. 575, ll. 8 – App. 577, ll. 3. He was originally charged with CSC but the state changed it to assault to commit CSC because they could not prove penetration. He said he pled guilty under Alford.<sup>1</sup> App. 578, ll. 1 – App. 579, ll. 25.

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

He pled guilty based on what happened at trial. If he was not getting a new trial based on the juror admitting that she tampered the jury, then he did not have a chance. App. 579, ll. 14 – App. 580, ll. 14. He thought he would be found guilty at a second trial. But if he had known then what he knew now, he would not have pled guilty. App. 586, ll. 19 – App. 587, ll. 3.

When he did research after the trial, he realized the errors his trial attorney made. App. 580, ll. 7 – 16. There was no objection pretrial or during the trial to the forensic interview of the child. App. 582, ll. 16 – 24. He denied ever admitting to committing a lewd act on this child during his guilty plea. App. 591, ll. 10 – 20.

On cross-examination, Spellman admitted that his guilty plea was not an Alford, plea but was a negotiated plea to fifteen years. He felt he was in a lose-lose situation. At trial, he was facing thirty years on the CSC charge. He signed the sentencing sheet waiving presentment to the grand jury on the lewd act charge. App. 587, ll. 5 – App. 589, ll. 12. .

Spellman's trial attorney testified that in the beginning Spellman was adamant about fighting this charge and going to trial. The plea offer of lewd act was offered before trial but Spellman rejected it. App. 594, ll. 5 – App. 596, ll. 15. The trial attorney said that the child did not disclose until after Spellman told his estranged wife that he was filing for divorce. The attorney thought this accusation was a revenge tactic by the wife. Spellman denied the charges from the beginning and throughout. App. 596, ll. 21 – App. 597, ll. 12. Trial counsel admitted that there were a lot of objections he could have made throughout the trial. He did not object to a lot of the witnesses. He did not want to object too much as he felt this only highlighted the issues for the jury. He could have fought more on the video but the statute allowed it in. App. 598, ll. 1 – 25.

Spellman agreed to take the plea offer, and that was when the verdict was set aside. It was not an Alford plea but negotiated plea for fifteen years. App. 601, ll. 1 – 23. He and the second trial

attorney hired an independent expert to review the video. The only problem their expert saw with the video was that the state's expert did not do a closure. App. 608, ll. 1 – App. 609, ll. 12. Spellman's PCR attorney asked trial counsel if he objected to the forensic interviewing by Heather Smith. PCR counsel stated that the Kromah<sup>2</sup> case had not come out but there other cases on forensic interviewing. She told trial counsel that he never objected to the forensic interviewing. App. 612, ll. 21 – App. 613, ll. 25.

Spellman's PCR attorney argued in her closing that although the plea "took precedent," the plea was based on what happened at trial and the errors made then. She asked for a new trial. App. 618, ll. 7 – App. 620, ll. 13.

The PCR judge ruled that he found Spellman's testimony and assertions to not be credible. The judge found trial counsel's testimony to be credible and persuasive on all matters. App. 630. At the PCR hearing, the judge ruled that it was hard to overturn a negotiated sentence, and he was not going to do it. He did not see anything the trial attorney did except not to object to the forensic interviewer, Heather Smith, as none of that would have been admissible today. Ms. Smith just went into too much about delayed reporting and children. But the judge did not think that impacted the outcome of the trial. However, Spellman got the benefit of the lewd act versus the CSC. The judge stated that it was in Spellman's best interest to take the fifteen years as he would probably be convicted at another trial. Spellman knew what he was doing in taking the negotiated sentence. App. 622, ll. 12 – App. 624, ll. 20.

In his order, the PCR judge found that by pleading guilty, Spellman "expressly waived any challenge to those prior proceedings." Allegations of counsel's ineffectiveness at trial were not

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<sup>2</sup> State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). The Supreme Court wrote in Footnote Four that the title of forensic interviewer was a misnomer; and the RATAAC style of interviewing was not scientific.

relevant. App. 631. The judge held that Spellman had a full understanding of the consequences of the plea and the charges. Therefore, Spellman's guilty plea was freely, voluntarily and intelligently made. App. 632.

A criminal defendant is entitled to effective representation at trial and on direct appeal. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052(1984). In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance must have prejudiced the applicant's case. Id., Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The applicant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certainty that the plea is "an intentional

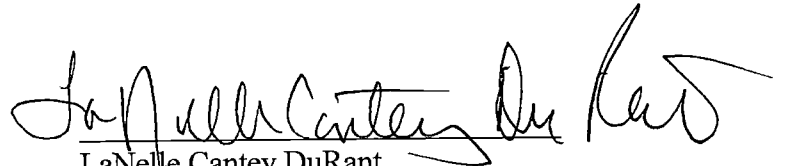
relinquishment or abandonment of a known right or privilege.” State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982).

The PCR judge erred in not finding plea counsel ineffective for not insuring that Spellman wanted to plead guilty and was satisfied that he knew all of the evidence against him. Trial counsel admitted that Spellman wanted a trial from the beginning as he wanted to fight this charge. Spellman pled guilty due to the outcome of the trial. This outcome may have been different if trial counsel had made the proper objections. Trial counsel admitted that he could have fought more.

CONCLUSION

Based on the above, certiorari should be granted, and petitioner's sentence and conviction should be reversed, and his case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of October, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY  
J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

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REGINALD SPELLMAN,

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APPELLATE CASE NO. 2015-000525

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PETITION TO BE RELIEVED AS COUNSEL

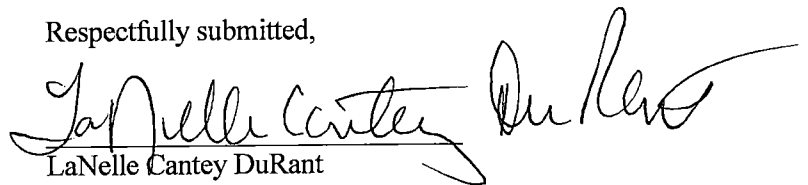
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Counsel for Reginald Spellman states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on December 9, 2014. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Reginald Spellman.

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 15th day of October, 2015

STATE OF SOUTH CAROLINA

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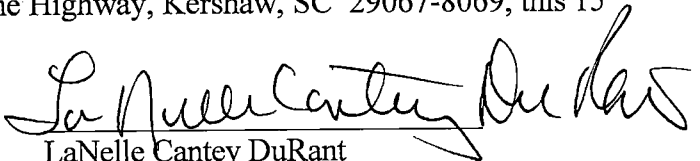
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CERTIFICATE OF SERVICE

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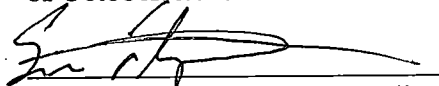
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Clay Mitchell, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Reginald Spellman, #251838, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 15<sup>th</sup> day of October, 2015.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day  
of October, 2015.



(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.